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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FLORAN SULIT, Defendant and Appellant.	E053176 (Super.Ct.No. FVI1001845) OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher B. Marshall, Judge. Affirmed.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Floran Sulit appeals after he pleaded guilty to one count of oral copulation of a minor under age 18, in violation of Penal Code section 288, subdivision (a). He contends that the trial court erred in imposing a lifetime sex offender registration requirement as a consequence of the plea, arguing that (1) defendant did not agree to the requirement as a part of his plea bargain, and (2) the trial court misunderstood its duty to exercise discretion in determining whether to impose the registration requirement. We affirm.

FACTS AND PROCEDURAL HISTORY

Defendant was a teacher of mathematics at Silverado High School in Victorville. The victim, D.D., was defendant's student for three years. During the 2008-2009 school year, the victim told her best friend that she had a crush on defendant. By the end of that school year, the victim was having telephone conversations with defendant. During the 2009-2010 school year, her senior year, the victim told her friend that she was having "phone sex" with defendant, and that they had exchanged explicit pictures and videos. The victim showed her friend a video on her cell phone from "Cesar," and depicting an erect penis. "Cesar" was a name that the victim used when referring to defendant. One day, the victim and her friend stayed after school; the victim took defendant's cell phone from his desk to show her friend some pictures the victim had sent him. The friend saw four pictures of the victim, dressed only in a bra and panties or a swim suit.

The victim told her friend that she had had oral sex with defendant on at least three different occasions. One incident took place at defendant's residence. Another time,

defendant had the victim orally copulate him as they sat in his truck in front of her house. A third time, the victim again orally copulated defendant while they sat in his truck in an alleyway behind a store.

A short time before the senior prom, the victim told her friend that she had gotten "laid" by "Ken," another one of her code names for defendant. Some time during the second semester, which began in January 2010, the victim also told her friend that she had gone to defendant's classroom during his preparation period, and she had masturbated him while they sat on a couch.

The victim turned 18 years old in February 2010. At least some of the alleged acts took place when the victim was 17 years old.

In the summer of 2010, after the victim and her friend had graduated from high school, the friend visited another teacher at the school. During this visit, the victim's friend told the teacher about the victim's relationship with defendant. The teacher immediately reported the matter to police, who began an investigation.

The victim denied having a relationship with defendant, and denied sending any photographs or videos. The victim's mother also maintained that defendant had never done anything inappropriate with the victim. The police arranged for the victim's friend to make a pretextual telephone call to the victim, which was recorded. The victim told her friend that the police did not know the extent of her relationship with defendant; the police only had evidence of text messages, and the victim would deny everything else. The victim and her mother intended to "cover [defendant] up." The victim's mother told

the friend that defendant was "busted on the text messages and stuff but there is no other evidence." The victim told her friend that she would lie or say anything to help defendant; in the background of the telephone conversation, the victim's mother could be heard saying that they were trying to get a lesser sentence for defendant.

The police interviewed defendant. Defendant maintained that he did not begin a sexual relationship with the victim until after she had graduated from high school, when she would have been 18 years old. When the investigating officer asked defendant about the specific incidents of oral copulation and masturbation, defendant could not explain them. He did not deny that they had taken place. He indicated that the victim was the one who wanted sex, and even though he told her "no," she would not stop. Defendant blamed the victim, and said that he felt like he was being "raped." Defendant admitted sending explicit photographs and videos to the victim while she was still 17 years old. He sent her the photographs and videos of his penis "because she told him to send them and he couldn't say no."

Defendant was charged in a felony complaint with three counts of oral copulation of a person under age 18 (Pen. Code, § 288a, subd. (b)(1)), and one count of sending harmful matter to a minor (Pen. Code, § 288.2, subd. (a)). Defendant pleaded not guilty to all charges. About one month after charges were filed, defense counsel requested a continuance to look into possible immigration consequences of the charges. About one week later, defendant entered into a plea bargain, to plead no contest to one count of oral copulation. He would be granted probation, with a lid of one year in county jail, and the

remaining charges would be dismissed. Defendant's plea agreement form recited that "My attorney explained to me that other possible consequences of this plea . . . may be: (Circle possible consequences): . . . ." Among the indicated possible consequences were: "(h) Required to submit to HIV test," and "(j) Other: Lifetime registration per PC 290." Another provision advised defendant that, "I understand that if I am not a citizen of the United States, deportation, exclusion from admission to the United States, or denial of naturalization will result from a conviction of the offense(s) to which I plead guilty/nolo contendere (no contest)." Defendant also initialed provisions to the effect that he had not been coerced into the plea, that he had not been promised anything else to obtain his plea, that he was not under the influence of any drugs or condition which impaired his ability to understand the plea, and that he had had sufficient time to consult with his attorney about the plea and its consequences. On October 20, 2010, the court heard the change-of-plea proceeding. The court questioned defendant on the contents of the plea agreement form, including his understanding of his rights, the proposed sentence, his mental state, and consequences of the plea. Defendant replied that he had not been coerced into the plea, he was not influenced by alcohol or drugs, and he had had sufficient time to consult with his lawyer about the plea bargain. The court inquired whether defendant had any questions about the plea bargain; defendant asked, "Just the lifetime thing – that's the only thing I'm curious about – because I've been told that's it." The court stated, "By virtue of this – what you're pleading to, there is lifetime registration that's required, sir." Defense counsel stated, "We've discussed that, your Honor, for the record." Defendant

made no protest or further inquiry, but went ahead with the plea; the court accepted defendant's no contest plea, and set the matter for sentencing.

Before the date set for sentencing, defendant filed a motion to withdraw his plea. The sole ground raised in the motion was that defendant's trial attorney rendered ineffective assistance of counsel, in that he had been going to consult with an immigration specialist to analyze and advise defendant of the potential immigration consequences of his plea, but his trial counsel failed to send any information to the immigration attorney. On the day of the plea, defendant had asked his trial counsel for more time to consider the immigration consequences of the plea, but his attorney told him he could not have any more time. Defendant averred in the motion papers that his trial attorney "did not tell me, specifically, what any immigration consequences of my plea were likely to be." Defendant found out from his immigration lawyers, only after he had changed his plea, that he was likely to be deported, denied reentry into the United States, or denied naturalization. Defendant was also concerned that the immigration consequences could lead to the loss of his teaching credential. The motion to withdraw the plea made no mention of any ground having to do with sex offender registration.

The court took testimony on defendant's motion to withdraw his plea. Defendant waived his right to attorney-client privilege concerning the entry of his no-contest plea. Defendant testified, as he had averred in his declaration, that he did not want to plead because he had not been advised of the answers to his immigration questions; he asked his attorney for more time to consider the plea. Had his attorney allowed him more time

to consider the immigration consequences, and if he had known what those consequences were, he would not have pled no contest. Defendant admitted on cross-examination, however, that he had initialed the provision of the plea form informing him that he could be deported, excluded from the United States or denied naturalization as a result of his plea. He admitted that he had told the court that he understood the rights he was waiving, and that he had had sufficient time to discuss all the provisions with his attorney. When the court had asked defendant if he had any questions, he did not ask any questions about immigration, but mentioned only the point that he was concerned about the lifetime sex offender registration provision. Defendant claimed that he had not read the plea form, but had merely signed where his attorney had indicated.

Defendant's trial attorney testified that he was aware that defendant could be deported as a result of his plea. The trial attorney indicated that he had talked to defendant about the maximum punishment for the charges, the potential for a state prison sentence, and the sex registration statute. The "major theme" of defendant's concerns was "the deportation issue and the 290 [sex registration] consequences." The trial attorney did advise defendant that, if he were sentenced to less than one year in the county jail, the offense would not be classed as an aggravated felony, such that deportation would not be automatic. The attorney specifically denied that defendant had asked for more time on the day of the plea to consider immigration consequences. He testified that defendant was not primarily concerned with the immigration consequences of the plea; rather, defendant's focus was mainly on the sex registration requirement:

"His major concern really was always the registration because that ultimately will follow you for life. We talked about that I can't even count how many times over the course of the representation. And that was always his main concern. And that was his main concern on the 20th [Oct. 20, 2010, the date defendant entered his plea] was the 290 issue, not anything about the immigration consequences."

The court credited the trial attorney's testimony that he had, in fact, advised defendant of the potential immigration consequences of the plea, and denied the motion to withdraw the plea.

The court then proceeded to sentencing. The court withheld sentence on count 1, and granted probation; defendant would be on supervised probation for three years, with 364 days in the county jail as a term of probation. The court further stated that, "you do have a lifetime registration requirement, which is Term 31 [of probation], but it was also specifically in your plea agreement in this matter pursuant to Penal Code section 290. [¶] The Court also notes that the registration applies, not only is it a lifetime requirement, but if you indeed change addresses. So it is something that is an annual requirement and one that if you change addresses, you must register that change of address within five working days."

Defendant filed a notice of appeal from the judgment.

ANALYSIS

I. Standard of Review

Defendant frames the issue as one of the trial court's exercise of discretion. That is, in *People v. Hofsheier* (2006) 37 Cal.4th 1185, the California Supreme Court had held it unconstitutional to impose a mandatory lifetime sex registration requirement in one class of cases (nonforcible oral copulation of a 16-year-old), and not requiring it in other similar cases (nonforcible sexual intercourse with a 16-year-old). Therefore, the registration requirement was not mandatory, but discretionary, in both types of cases. Defendant here contends that the trial court misunderstood its discretion, and consequently failed to exercise its discretion, instead believing that the registration requirement *was* mandatory in this case. "A trial court's failure to exercise discretion is itself an abuse of discretion, and we review such action in accordance with that standard of review." (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515, citing *People v. Orabuena* (2004) 116 Cal.App.4th 84, 99.)

II. The Court Did Not Err in Imposing the Registration Requirement

Defendant urges that the record of the trial court's comments shows that it misunderstood the scope of its discretion with respect to the sex offender registration statute: Defendant argues that the court improperly believed the requirement was mandatory, rather than discretionary. The court stated, at the time the plea was taken, that "what you're pleading to, there is lifetime registration that's *required*." (Italics added.) Alternatively, defendant argues that the court misunderstood the terms of the

plea bargain itself, i.e., in regarding sex registration as an agreed term of the bargain itself. That is, the court stated at sentencing that the registration was "specifically in your plea agreement," thus indicating that the trial court failed to recognize that the registration was a possible, but not a necessary, consequence of the plea.

The trial court's language at the time of taking the plea, and at the time of sentencing, did not necessarily indicate that the trial court misunderstood the scope of its discretion, or the scope of the plea bargain. The court's statements are ambiguous on that score; the remarks are equally consistent with the court's recognition and exercise of its discretion to impose the registration condition, either under *People v. Hofsheier*, *supra*, 37 Cal.4th 1185, or as a sentencing choice under the plea bargain.

Although defendant contends that he did not agree to mandatory sex registration as a part of his plea bargain, it is also the case that his bargain fully contemplated the possibility that the registration requirement could be imposed. The change of plea form expressly provides that "My attorney explained to me that other possible consequences of this plea . . . may be: . . . Lifetime registration per PC 290." The only question defendant raised with respect to his plea bargain was the registration requirement, and the court informed defendant that lifetime registration would be required. Defense counsel stated that he had discussed that matter extensively with defendant, and defendant expressly acknowledged in the plea form his understanding that such a requirement could be imposed.

Defendant points, among other things, to his trial counsel's testimony during the hearing on his motion to withdraw his plea, that defendant's primary concern always was the sex registration requirement. This testimony was, however, entirely consistent or compatible with what transpired at the change-of-plea hearing. Defense counsel acknowledged at the time of the plea that he and defendant had previously discussed the registration requirement. Defendant went forward with the plea bargain, even after he expressly questioned the registration requirement, and was informed of its likely, or even certain, imposition. The plea bargain to which defendant agreed allowed the possibility that the court might exercise its discretion in his favor, but did not exclude the possibility—indeed, the high probability—that the lifetime registration requirement would be imposed. The court's statement that registration under the statute would be "required," does not preclude that the trial court understood and exercised its discretion *whether* to impose the sex registration requirement; rather, the remark explains that, *when* Penal Code section 290 applies, registration will be a lifetime requirement. (Cf. *People v. Hawthorne* (2009) 46 Cal.4th 67, 93, fn. 4 [The defendant argued that the trial court failed to exercise its discretion in weighing the prejudicial versus the probative value of evidence under Evid. Code, § 352, because it remarked, "'At some point I am going to be dealing with 352, but I'm going to overrule the objection at this point.'" Instead, the remark indicated that the court was in fact exercising its discretion, but that it might need to reweigh the evidence after it heard additional testimony.].)

In addition, even if it be posited that the court did misunderstand the scope of its discretion, we may affirm, "if the appellate court can conclude the appellant suffered no prejudice either because it would have been an abuse of discretion to rule in the appellant's favor [citation] or because it is not reasonably probable that the appellant would have obtained a more favorable result had the court exercised its discretion. [Citation.]" (*S.T. v. Superior Court* (2009) 177 Cal.App.4th 1009, 1016.)

Under the circumstances here, it would be patently absurd not to impose the registration requirement on defendant. He was a teacher, who stood in loco parentis to his students, and who had the duty to exercise appropriate care and control over them, and to maintain their safety. (See *Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 874 [both under the common law and by statute, in a school setting a teacher stands in loco parentis to his or her students].) Far from fulfilling these obligations, defendant abused his position of authority to sexually molest or otherwise behave inappropriately with the victim, one of his students. When confronted with his misconduct, initially he lied to authorities, and then resorted to blaming the victim, minimizing his own responsibility, and casting himself in the victim role. In view of the high professional standards of character required of those charged with the care of students, it is inconceivable that any court would not impose permanent sex offender registration on a teacher, like defendant, who molested a student.

The trial court's remarks do not necessarily preclude the proper exercise of its discretion, but even if we assume for the sake of the argument that the court did

misunderstand the scope of its discretion, defendant was not prejudiced thereby. It is not reasonably probable that the result would have been different had the court clearly indicated on the record its intent to exercise its discretion in imposing the registration requirement. It would have been an abuse of discretion under the circumstances for the court *not* to impose the registration requirement.

DISPOSITION

For the reasons stated, the judgment is affirmed.

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MCKINSTER
J.

We concur:

RAMIREZ
P.J.

RICHLI
J.